SUPREME COURT U. S.

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JOHN F. DAVIS, CLE

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 414

TOM S. BUMGARNER, *et al.*,
Petitioners,

VERSUS

JOE BROWN COMPANY, INC., a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August, 1967

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Certiorari should be denied. Petitioners contend that the case was unripe for summary judgment and that *Morris* v. *McComb*, 332 U.S. 422 (1947), which the District Court and Court of Appeals deemed controlling, was distinguishable and itself *incorrectly decided*. Both contentions are insupportable on their merits and neither contention involves any special or important reason for review as contemplated in Rule 19 of this Court.

STATUTES INVOLVED

Section 7 of the Fair Labor Standards Act requires employers to pay employees one and one-half times their regular hourly rates for hours worked in excess of forty (40) per week. 29 U.S.C. § 207.

Section 13(b)(1) of the same Act, however, provides that Section 7 shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the Motor Carrier Act, 49 U.S.C. § 304. 29 U.S.C. § 213(b)(1). Such employees are referred to as "exempt employees."

Employers are not required to pay exempt employees at more than their regular rates for hours worked in excess of forty (40) per week.

In *Morris v. McComb*, 332 U.S. 422, 423-424 (1947), it was held that the Interstate Commerce Commission had the power:

> "* * * to establish qualifications and maximum hours of service with respect to drivers and mechanics employed full time, as such, by a common carrier by motor vehicle, when the services rendered, through such employees, by such carrier, *in interstate commerce*, are distributed generally throughout the year, constitute 3% to 4% of the carrier's total carrier services, and the performance of such services is shared indiscriminately among such employees and mingled with their performance of other like services for such carrier *not in interstate commerce*."

It was further held that:

> "* * * the overtime requirements of Section 7 of the Fair Labor Standards Act therefore do not apply to such employees."

ARGUMENT

Proposition I

There was no genuine issue of fact.

The facts bringing this case squarely within the control of *Morris* v. *McComb* were established by competent sworn statements supporting the motion for summary judgment in the District Court (R. 4, 13, 17), which were summarized by the District Court (R. 14-15) and by the Court of Appeals in 376 F.2d at 750. The only opposing affidavit was made by petitioners' counsel. Excluding only formal parts, this affidavit read as follows (R. 11):

> "I oppose the motion of defendant, and do not believe the statements of facts made in defendant's affidavit in support of said motion to be true.
>
> "By reason of the fact that neither I nor the plaintiffs whom I represent, have any access to the records of the defendant, I cannot of my own knowledge present by this affidavit facts essential to justify my opposition."

The Court of Appeals held this counter-affidavit insufficient to dispute the factual allegations contained in respondents' supporting affidavit. In addition to the authorities cited by that Court, its conclusion on this point is supported by *Zaidan* v. *Borg-Warner Corporation,* 341 F.2d 391, 393 (3rd Cir. 1965); *Internat'l Longshoremen* v. *Kuntz,* 334 F.2d 165 (9th Cir. 1964); *Wilson Jones Co.* v. *Gilbert & Bennett Mfg. Co.,* 332 F.2d 216, 219 (2d Cir. 1964); *Engl* v. *Aetna Life Ins. Co.,* 139 F.2d 469, 472-473 (2d Cir. 1943); *Belinsky* v. *Twentieth Restaurant, Inc.,* 207 F.Supp. 412 (D.C.S.D.N.Y. 1962); *Long Island Railroad Co.* v. *New York Central Railroad Co.,* 197 F.Supp. 21 (D.C.E.D.N.Y. 1961).

Nothing in *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1961), upon which petitioners rely, is to the contrary. It holds that summary judgment should not be allowed where the truth is not quite clear and that summary procedures should be used sparingly in complex antitrust litigation.

Proposition II

A. Morris v. McComb is not distinguishable from this case.

The Court of Appeals regarded the present case and *Morris* v. *McComb* as having "almost identical factual background(s)." Petitioners attempt to distinguish *Morris* v. *McComb* as applicable only to *individual drivers* engaged in interstate commerce. Individual interstate commerce activity was not shown as to the individual petitioners here only the percentage of respondent's revenue from interstate commerce as a common carrier was shown. *Morris* v. *McComb* was based on a percentage of the employer's revenue (332 U.S. at 427), the drivers' *average* interstate activity was considered (332 U.S. at 431), and two of the individual drivers there held exempt had made *no trips* in interstate commerce (332 U.S. at 431-432, 440).

B. Morris v. McComb was correctly decided.

In support of their contention that *Morris* v. *McComb* was incorrectly decided, petitioners cite the dissent of Mr. Justice Murphy therein and *United States* v. *American Trucking Ass'ns*, 310 U.S. 534 (1940).

The dissenting views expressed in *Morris* v. *McComb* were rejected by the majority of the Court in that case.

Petitioners advance no special or important reasons for the Court to reconsider that rejection.

United States v. *American Trucking Ass'ns* holds that the Interstate Commerce Commission's regulatory power is limited to those employees whose activities affect safety of operation of motor vehicles engaged in interstate commerce. Truck drivers' activities affect safety of operation. *Morris* v. *McComb.* Petitioners were truck drivers (R. 7, 14). They were therefore within the Commission's regulatory power as limited by the *American Trucking* decision.

A. H. Phillips, Inc. v. *Walling,* 324 U.S. 490 (1945), and the Court of Appeals decisions cited by petitioners are authority for narrow construction of exemptions from the Fair Labor Standards Act, but none of them has anything to do with the particular exemption here considered.

Petitioners contend that the decision in *Morris* v. *McComb* is contrary to the intent of Congress in enacting the Fair Labor Standards Act, citing in support of this contention only Mr. Justice Murphy's dissenting opinion therein. *Morris* v. *McComb* was decided almost 20 years ago. In that time the Congress has enacted many amendments to the Fair Labor Standards Act but has not amended Section 13(b)(1), which states the exemption construed adversely to petitioners in *Morris* v. *McComb.*

Such inaction by Congress indicates legislative approval of the Court's construction of the Act. *United States* v. *Elgin, J. & E. R. Co.,* 298 U.S. 492, 499-501 (1935). When questions are of statutory construction, not of constitutional import, Congress can rectify any mistaken interpretation by the Court, and if Congress has not seen fit to do so, the

Court should not readily reverse its original interpretation. *United States* v. *South Buffalo Ry. Co.*, 333 U.S. 771, 774-775 (1948). It cannot be said that this Court *must follow* its own prior statutory interpretation unless Congress amends the statute. See dissenting opinion in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 74 (1955). But when a question of statutory construction is presented it must be viewed in the light of prior holdings which have been left unchanged by Congress. See *Reed* v. *Steamship Yaka*, 373 U.S. 410, 414 (1963); *Toolson* v. *New York Yankess*, 346 U.S. 356 (1953).

CONCLUSION

The petition here presents no unsettled question, but one which was settled by this Court almost 20 years ago in *Morris* v. *McComb*, 332 U.S. 422 (1947). That controlling decision of this Court is indistinguishable from the present case, and it was applied properly by the Court of Appeals and District Court. Petitioners have advanced no reason warranting review of the earlier decision. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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